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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 877

IN THE MATTERS

of

THIRD AVENUE TRANSIT CORPORATION, *et al.*,

Debtors.

A. PHILIP WOOLFSON,

Petitioner,

v.

LESTER T. DOYLE, As Trustee in Reorganization, *et al.*,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SIRS:

Petitioner petitions for rehearing of the order of June 8, 1959 denying petition for writ of certiorari on grounds which were not raised in the petition of certiorari but which are available to petitioner and are of a substantial nature.

1. The Solicitor General is incorrect in his argument[1] that (1) the court was without power to compel the Commission to institute criminal proceedings against the New York Stock Exchange, and (2) the power of the Commission with respect to the initiation of enforcement proceedings is not subject to court review.

What is involved in the instant case is not the question of the Commission's discretionary power under Section 21(e) of the Securities Exchange Act of 1934[2] to enforce compliance with the Commission's regulations but rather the power of the Commission to initiate criminal proceedings for past violations of its regulations and whether such power is subject to court review. There is nothing in the Act or in its legislative history that suggests any Congressional intent to deprive the Commission of full power of prosecution under the provisions of Section 32 of the Securities Exchange Act of 1934[3] which provides for fine and/or imprisonment upon conviction for wilful violation of any provisions of the Act or any rule or regulation thereunder.

Section 32 of the Securities Exchange Act of 1934 (48 Stat. 904-05, 15 U.S.C., Sec. 78ff(a) provides:

> (a) Any person who willfully violates any provision of this title or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report or document required to be filed under

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[1] Brief for the Securities and Exchange Commission in Opposition, page 5.

[2] 48 Stat. 900 (1934), 15 U.S.C., Sec. 78u(e) 1952.

[3] 48 Stat. 904-05 (1934), as amended, 15 U.S.C., Sec. 78ff(a) 1952.

> this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined, not more than $10,000 or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he has no knowledge of such rule or regulation.

The language of Section 21(e) of the Securities Exchange Act of 1934[4] that "whenever it shall appear to the Commission that any person *is engaged* or *about to engage* in any acts or practices which *constitute* or *will constitute* a violation" (emphasis supplied) indicates that the Commission's enforcement power under this section to secure compliance with the Commission's regulations relates to *present* and *future* violations, and that the evidence that may be transmitted to the Attorney General under this section of the Act relates to present violations. The Solicitor General is in error, however, when he implies that under the Act the Commission's statutory authority to institute criminal proceedings is limited to "the referral of evidence concerning possible criminal violations to the Attorney General". While there is no section in the Act which expressly confers power upon the Commission to take action in the case of *past* violations, it does have the full power of prosecution given it under Section 32[5] of the Act for violations of the Act involving fraud and to seek the imposition of criminal penalties under that section of

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[4] 48 Stat. 900 (1934), 15 U.S.C., Sec. 78u(e) 1952.

[5] 48 Stat. 904-05 (1934), 15 U.S.C., Sec. 78ff(a) 1952.

the Act. The provisions of Section 21(e)[6] of the Act in no way limit or restrict the Commission's power under Section 32 of the Act to enforce the penalties prescribed in that section of the Act for wilful violations and to refer to the Attorney General evidence concerning *past* criminal violations.[7] The power of the Commission to seek court enforcement of its rules as well as the power of the courts to compel the Commission to exercise its power under the Act to initiate enforcement proceedings seeking to enforce penalties prescribed for violations of such rules is provided in Section 27 of the Securities Exchange Act of 1934[8] which states that "the District Courts of the United States * * * shall have jurisdiction of offenses and violations under this subchapter and under the

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[6] 48 Stat. 900 (1934), 15 U.S.C., Sec. 78u(e) 1952.

[7] The Solicitor General cites *Crooker* v. *Securities and Exchange Commission*, 161 F. 2d 944, 949 (C. A. 1) to support the view that the court is without jurisdiction to review the Commission's power to initiate enforcement proceedings. That case involved a petition for a decree directing the Commission to institute a proceeding looking to a stop order suspending the effectiveness of a registration statement. The court there held that the Commission had administrative discretion to institute such a proceeding if it appeared to the Commission that a registration statement is false and misleading. Also cited by the Solicitor General is the case of *Jacobsen* v. *National Labor Relations Board*, 128 F. 2d 96, 99-100 (C. A. 3). This case involved a petition for a decree setting aside an order of the National Labor Relations Board dismissing a complaint charging unfair labor practices. The court there held that the Board does not have to cause a complaint to be issued against the employer or proceed to prohibit any unfair labor practice complained of. Both of these cases have to do with the discretionary power of the respective agencies to enforce compliance with the applicable statutes and regulations. Neither case bears upon the question of the power of the Courts to review the Commission's failure to use its power to enforce the criminal penalties of the statute and regulations for wilful violation thereof.

[8] 48 Stat. 902 (1934), 15 U.S.C., Sec. 78aa (1952).

rules and regulations promulgated by the Commission in respect thereto * * *." The power of the District Courts to issue writs of mandamus to compel the Commission to use its power to punish violators is found in 28 U.S.C., Section 1651(a) which states "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."* In *S.E.C. v. Transamerica Corp.*, 163 F. 2d 511 (C. A. 3) the Court held that "the District Court possesses authority to make any order necessary to enforce liabilities or duties created by this chapter or rules promulgated pursuant thereto."

Whether a District Court will mandamus the Commission to enforce the criminal penalty provisions of the statute is a matter of sound judicial discretion. In the present instance there was an abuse of judicial power by the court in denying petitioner a hearing on his motion to mandamus the Commission (R. 39a to R. 44a, R. 55a) since the Court's decision was premised on the argument by the reorganization trustee (R. 49a to R. 52a) and counsel for the Commission (S.E.C. Brief, page 5, footnote 3) that the actions of the New York Stock Exchange in delisting the common stock of debtor Third Avenue Transit Corporation was proper and in full accord with the rules of the Commission. In effect the District Court under the guise of discretion dispensed with indicated and required procedure which in ultimate effect constituted a surrender of jurisdiction to the Commission and premature exoneration and exculpation of the reorganization trustee and the New York Stock Exchange should the Commission's interpretation of the

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* It should be noted that rule 81(b) of the Federal Rules of Civil Procedure abolishes the writ of mandamus but provides that the relief heretofore available by mandamus may be obtained by appropriate action or motion under the practice provided in the rules.

applicable S.E.C. delisting regulation prove to be erroneous on appellate review. In the present instance the failure of the District Court to issue the mandamus order defeated appellate review. (*Maryland* v. *Soper*, 270 U. S. 9, 29, 30, 46 S. Ct. 185, 189, 70 L. ed. 449; *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 77 S. Ct. 309, 1 L. ed. 2d 290.)

2. The decision of the District Court (R. 61a to R. 64a) that the action of the Stock Exchange in delisting the common stock of debtor Third Avenue Transit Corporation was in accordance with the rules of the Securities and Exchange Commission was based on a distorted construction of the provisions of delisting regulation X-12D2-2.

The stock of debtor Third Avenue Transit Corporation was delisted on May 4, 1957 pursuant to application on Form 25 by the New York Stock Exchange filed with the Commission purportedly in compliance with the requirements of S.E.C. Rule X-12D2-2. (Application appears in petitioner's brief, pages 11-13). On November 19, 1956 the certificate of incorporation of debtor Third Avenue Transit Corporation was amended (pursuant to court order confirming reorganization plan) to eliminate the 167,509 shares of common stock of debtor which debtor had previously been authorized to issue (the certificate of amendment became effective on December 6, 1956); these are the securities which were the subject of the delisting application above noted.

The provisions of S.E.C. delisting regulation X-12D2-2 (17 CFR 240.12d2-2) are as follows:

Removal From Listing and Registration of Matured, Redeemed or Retired Securities

RULE X-12D2-2. (a) Within a reasonable time after a national securities exchange knows or is reliably informed that any of the following conditions exist with respect to

a security listed and registered thereon, the exchange shall file with the Commission a notification on Form 25 of its intention to remove such security from listing and registration:

(1) *The entire class of the security* has been called for redemption, maturity or retirement; appropriate notice thereof has been given; funds sufficient for the payment of all such securities have been deposited with an agency authorized to make such payments; and such funds have been made available to security holders.

(2) *The entire class of the security* has been redeemed or paid at maturity or retirement.

(3) The instruments representing the securities comprising *the entire class* have come to evidence, by operation of law or otherwise, other securities in substitution therefor and represent no other right, except, if such be the fact, the right to receive an immediate cash payment (the right of dissenters to receive the apprised or fair value of their holdings shall not prevent the application of this provision).

(4) All rights pertaining *to the entire class of the security* have been extinguished; provided that where such an event occurs as the result of an order of a court or other governmental authority, the order shall be final, all applicable appeal periods shall have expired, and no appeals shall be pending.

Effective Date of Removal.—If the conditions of this rule are complied with, removal of a security from listing and registration pursuant to a notification on Form 25 shall become effective at the opening of business on such date as the exchange shall specify in said Form; *provided however*, that such date shall be not less than seven days fol-

lowing the date on which said Form is mailed to the Commission for filing; and *provided further* that in the event removal is being effected under paragraph (a)(3) of this rule and the exchange has admitted or intends to admit a successor security to trading under the temporary exemption provided for by Rule X-12A-5, such date shall not be earlier than the date on which the successor security is removed from its exempt status.

In interpreting the provisions of Rule X-12D2-2 the District Court misread the applicability of sub-paragraph (4) (R. 63a). What is involved in this sub-paragraph is the case of a legal dispute resulting from the repayment, retirement or redemption by a *solvent* corporation of an entire class of its securities. In interpreting sub-paragraph (4) to refer to the delisting of a security where the rights of stockholders have been extinguished through a finding of strict insolvency, the Court ignored the context in which the said sub-paragraph appears, namely, that it applies only to the situation where the entire class of a security is extinguished through payment, redemption or retirement by an existing corporation without court order. The court's interpretation is further not in accord with the provisions of Rule 499 of the Rules of the Board of Governors of the Exchange which covers the delisting of securities in the case of payment, redemption or retirement of entire class, issue or series. That rule provides that "Whenever the entire outstanding amount of a listed class, issue or series is retired through payment at maturity, or through redemption reclassification or otherwise, the Exchange, at a time which is appropriate in consideration of the circumstances of the particular case, may suspend dealings in the security and give notice to the Commission, on the Commission's Form 25 of intention to remove such security from listing and registration, as required by Rule X-12D2-2 of the Commission".

This Court can take judicial notice of the following:

(1) That the New York Stock Exchange has a staff of experts who keep thoroughly abreast of all S.E.C. regulations.

(2) That the Securities and Exchange Commission has a staff of experts who keep thoroughly abreast of all New York Stock Exchange regulations.

(3) That both the New York Stock Exchange and the Commission have a staff of experts who keep continually informed about developments affecting listed securities.

(4) That both the Exchange and the Commission know that corporate action is required to extinguish an entire class of securities through payment, redemption or retirement.

(5) That both the Exchange and the Commission knew that the common stock of debtor was not extinguished through payment, redemption, or retirement.

(6) That the Commission's delisting regulations were intended for the protection of investors in listed and registered securities.

(7) That both the Exchange and the Commission knew that if the delisting application had been filed pursuant to the provisions of Rule X-12D2-1 (R. 20a to R. 23a), that (a) the Board of Governors of the Exchange would have to adopt a resolution directing that such application be filed with the Commission, and (b) the Commission would give interested parties the opportunity to request hearings on such application.

3. The representation by the reorganization trustee to the District Court that the Exchange had complied with

the applicable delisting regulations (R. 51a to R. 52a) was a fraudulent representation. A fraudulent representation to the court is a criminal offense and subjects the maker to the penalties provided in 18 U.S.C., Sec. 1001 (48 Stat. 996). The applicable provision of that statute states that "Whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both."

"Willful" does not require evil intent, but does mean that the forbidden act is done deliberately and with knowledge. (*McBride* v. *U. S.*, 225 F. 2d 249.) The reorganization trustee, senior member of a New York Stock Exchange firm knew that his representation to the court as to the Exchange's compliance with the applicable delisting regulations of the Commission was not true.[10]

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[10] The fraud perpetrated upon the court by the trustee, and condoned by the Commission, with respect to the representation concerning delisting, is related to the fraud alleged by petitioner of denial by the trustee of notice of the hearing on, and the entry of the order of, strict insolvency of debtor (R. 11a, R. 26a to R. 29a).

CONCLUSION

The reorganization proceeding is tainted with fraud. The petition for rehearing should be granted.

Respectfully submitted,

A. PHILIP WOOLFSON,
Attorney Pro Se.

Dated: June 24, 1959.

Certificate

I do hereby certify that the within petition is restricted to the grounds specified in the applicable provisions of Rule 58 of the Supreme Court Rules and that it is presented in good faith and not for purposes of delay.

A. PHILIP WOOLFSON,
Attorney Pro Se.

Dated: June 24, 1959.